STATE OF MICHIGAN

COURT OF APPEALS

BAILEY MALTHANER, a Minor, by her Next Friend, JAMES M. MALTHANER, and JAMES M. MALTHANER and TRICIA C. MALTHANER, Individually, Plaintiffs-Appellants,	UNPUBLISHED March 20, 2012
v	No. 303085 Ingham Circuit Court
MEIJER INC, Defendant-Appellee.	LC No. 10-000149-NO

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs, minor Bailey Malthaner and her parents, James M. Malthaner and Tricia C. Malthaner, appeal as of right from an order granting defendant, Meijer Inc., summary disposition pursuant to MCR 2.116(C)(10) in this personal injury action. We affirm.

I. BASIC FACTS

Eleven-year-old Bailey was injured when liquid from a package containing a hot cooked chicken spilled on her while shopping at one of defendant's stores.

Bailey had just had a tooth removed at the dentist and she and her mother, Tricia, were shopping for soft foods that Bailey would be able to eat for the next several days. Tricia decided to purchase a pre-cooked chicken from the deli to feed to the rest of the family. The chicken was cooked to an internal temperature of 165 degrees, placed in a plastic container that was clear on top, snapped closed, and placed in a cardboard wrapping with a handle. As a matter of food safety and to prevent the growth of bacteria, the chicken was kept between 140 and 180 degrees in the display case/warmer, which was clearly marked "HOT-CAN CAUSE SEVERE BURNS." Employees periodically put a calibrated thermometer into tiny holes on the top of the plastic to make sure the chicken maintained a temperature of 140 degrees.

Bailey was seated in the main compartment of the shopping cart with her legs bent and her feet flat on the cart. Tricia selected a chicken from the warmer and picked it up by the cardboard handle, placing her other hand underneath it. Tricia did not inspect the package, but did not notice any cracks, defects, or liquid on the outside of the package. Bailey asked if she

could hold the chicken. Tricia handed it to her, warning that it was hot, but not specifically instructing Bailey how to handle it. The family had purchased these chickens in the past and, as stated in her deposition testimony, even 11-year-old Bailey understood that the contents were hot. A few seconds later, Bailey began to scream, as leaked juice from the package burned her leg. Tricia rushed Bailey to the pharmacy for help. Knowing that Bailey would need the rest of the items, Tricia proceeded to check out. When placing the chicken on the conveyor, Tricia noticed that the top lid had popped off and that the package was no longer sealed. Tricia kept the container, which was now dented and cracked. She could not say for sure when the damage occurred, admitting that it may have occurred when she unpacked the chicken. Bailey was taken to urgent care where she was treated for second-degree burns.

Plaintiffs' February 4, 2010, complaint alleged that "Plaintiffs were a patron of Defendant's store, Defendant owed a duty to the Plaintiffs to maintain their premises in a safe condition and further, to ensure products and goods sold were safe for consumers and not defective or defectively packaged." The complaint alleged

> 6. Defendant breached such duty in one or more respects as far as is presently known.
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> a. In failing to properly package and maintain its merchandise so as to prevent injury and damages to its customers;
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> b. In maintaining its products and goods in a dangerous condition so as to be capable of causing serious injury;
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> c. In failing to properly warn customers such as Plaintiffs, of the hazards and dangers present by their products;
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> d. In negligently displaying products in a defective and dangerous condition, capable of causing injury and damage.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that (1) it was open and obvious the container was hot and could cause burns, and (2) Tricia's negligence was the sole "but for" cause of Bailey's injuries. Plaintiffs responded that it was not a premises liability action. Defendant replied that the open and obvious doctrine applied to both premises and product liability, there was no evidence the container was cracked or damaged when an employee put the chicken inside, and Tricia's actions were the sole proximate cause of her daughter's injuries.

The trial court held that the open and obvious doctrine applied because the complaint alleged defendant violated its duty as owner of the premises or as an entity that puts a product in a consumer's hands. The court found that the danger was open and obvious because the container was clearly hot, was kept in a warmer with a sign saying that it was hot and could cause severe burns, and Tricia admitted she was aware the top could become open. The court found that it was a question of fact whether the mother was the sole proximate cause of Bailey's injury, but that such an inquiry was moot in light of its decision to grant summary disposition on the basis of the open and obvious doctrine. Plaintiffs now appeal as of right.

II. STANDARD OF REVIEW

This Court reviews de novo a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Issues of law are also reviewed de novo. *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 133; 517 NW2d 289 (1994). A court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). In making this determination, the court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Id.* The court must not resolve factual issues or determine credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

III. ANALYSIS

Plaintiffs argue that the open and obvious doctrine is inapplicable where the complaint sounds in ordinary negligence. We disagree.

The trial court found that, as a matter of law, the danger from hot cooked chicken was open and obvious. Whether the open and obvious doctrine applies depends on the theory underlying the negligence action. *Woodman v Kera, LLC*, 280 Mich App 125, 153; 760 NW2d 641 (2008), aff'd 486 Mich 228; 785 NW2d 1 (2010); *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). The doctrine applies only to premises and product liability, not ordinary negligence. *Woodman*, 280 Mich App at 153. Rather than being an exception to liability, the doctrine further defines the duty owed by premises owners and product manufacturers. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Laier v Kitchen*, 266 Mich App 482, 488, 494; 702 NW2d 199 (2005).

A cooked chicken that was available for consumers to purchase was not a condition on the land and, therefore, did not involve premises liability. See *Woodman*, 280 Mich App at 153; *Laier*, 266 Mich App at 491; see also *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). However, the chicken was a product provided to consumers. Products liability is defined as an action brought for injury caused by the production of a product; production is defined to include "manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling." MCL 600.2945(h) and (i). All the breaches of duty alleged in plaintiffs' complaint related to the production of the product, including design, packaging, inspection, and selling. Plaintiffs' claims, therefore, sounded in products liability. The confusion arose only because the injuries occurred while plaintiffs were still in defendant's store.

Defendant did not have a duty to warn of dangers from simple products that were readily apparent to a reasonably prudent user. MCL 600.2948(2); *Glittenberg v Doughboy Recreational, Inc*, 441 Mich 379, 395-396; 491 NW2d 208 (1992). Whether a danger was obvious is relevant in determining whether a simple product was unreasonably dangerous. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982); *Mallard v Hoffinger Indus, Inc (On Remand)*, 222 Mich App 137, 142-143; 564 NW2d 74 (1997).

A cooked chicken is a simple product. The chickens were cooked and kept at a high temperature in a warming display rack to prevent food poisoning. A reasonable consumer might have believed the "can cause severe burns" warning on the rack referred to the hot rack itself; however, it at least informed consumers that the chickens were being kept in a hot rack and, therefore, would still be hot themselves. Plaintiffs admitted they knew the chickens were hot; they just did not realize how hot or how severe the burns that could result from contact with the skin.

A manufacturer need not warn of all conceivable potential injuries. *Glittenberg*, 441 Mich at 402. Courts in other jurisdictions have repeatedly found that a reasonable consumer recognizes that hot liquids are hot and the danger is, therefore, obvious, regardless of whether the consumer appreciates the severity of potential burns. See, e.g., *McCroy v Coastal Mart, Inc*, 207 F Supp 2d 1265, 1277 (D Kan, 2002); *Holowaty v McDonald's Corp*, 10 F Supp 2d 1078, 1084-1085 (D Minn, 1998); *Bouher v Aramark Servs*, 181 Ohio App 3d 599, 604-605; 910 NE2d 40, 44 (Ohio App, 2009). Further, the obviousness of a danger is evaluated based on a reasonable adult if the product was not marketed specifically to children. See *Mallard*, 222 Mich App at 139 (a 13-year-old diving into a pool); *Kirk v Hanes Corp*, 16 F3d 705, 710-711 (CA 6, 1994) (lighters marketed to adults who are aware of the danger of children playing with them).

Plaintiffs also argue that defendant admitted it was negligent in offering the chicken in a cracked container. However, the record reveals that defendant's representative acknowledged only that it would be inappropriate to offer the chickens in damaged containers. It was impossible to know when the containers were damaged because even plaintiffs did not notice the cracks until hours later. According to defendant's representative, the packages were checked when the chickens were placed inside. Further, plaintiff mother admitted she knew the container lids could easily pop off and, therefore, there was a danger of the contents leaking out.

Defendant was not required to provide further warning of the obvious danger of hot cooked food kept in a warming rack. See MCL 600.2948(2); *Glittenberg*, 441 Mich at 395-396. The packaging and presentation of the chicken was also not unreasonably dangerous because the risk of being burned if the container was not treated carefully when it was removed from the warming rack was readily apparent; the purpose was to provide a hot prepared meal, and it was necessary to keep the cooked chicken hot to keep it safe for eating. See *Owens*, 414 Mich at 425.

The trial court did not err when it granted defendant summary disposition under MCR 2.116(C)(10).

Because summary disposition was properly granted on the basis of the open and obvious doctrine, we decline to address defendant's assertion that Tricia's negligence in handing the chicken to Bailey was the sole proximate cause of Bailey's injuries.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly